Nos. 89-1452 and 89-1453

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IN THE

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OCTOBER TERM, 1989

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC., *et al.*,

Petitioners,

v.

UNITED DISTRIBUTION COMPANIES, *et al.*

Respondents.

FEDERAL ENERGY REGULATORY COMMISSION,

Petitioner,

v.

UNITED DISTRIBUTION COMPANIES, *et al.*,

Respondents.

BRIEF OF *AMICUS CURIAE* STATE OF LOUISIANA IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission has statutory authority to act by general rule to raise the price of "old gas" under statutory provisions which provide that the price of old gas may be increased by "rule or order" and that the increased price must be "just and reasonable within the meaning of the Natural Gas Act."

PARTIES TO THE PROCEEDINGS

A list of the parties is set forth in Appendix F to the petition of Mobil Oil Exploration & Producing Southeast, Inc. and in Appendix D to the petition of the Federal Energy Regulatory Commission.

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BRIEF OF AMICUS CURIAE STATE OF LOUISIANA IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Amicus curiae, the State of Louisiana ("Louisiana") hereby submits this brief in support of the petitions for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit filed in this case by

Mobil Oil Exploration & Producing Southeast, Inc. *et al.* (the "Producers") and by the Federal Energy Regulatory Commission ("FERC") (collectively the "Petitions").

OPINIONS BELOW

Louisiana adopts and incorporates by reference the statements set forth in the Petitions.

JURISDICTION

Louisiana adopts and incorporates by reference the statements set forth in the Petitions.

STATUTES AND REGULATIONS INVOLVED

Louisiana adopts and incorporates by reference the statements set forth in the Petitions.

STATEMENT

This case involves an order of the FERC, Order 451, issued in June 1986, which raised the lawful price for "old gas" covered by Sections 104(b)(1) and 106(a) of the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3314(b)(1), 3316(a).[1] On September 15, 1989, a divided panel of the Court of Appeals vacated Order 451 in its entirety. The court based its ruling on a finding that the FERC had "exceeded the scope of its authority under NGPA" when it acted by rule to raise to a single ceiling price the different ceiling

[1] Louisiana adopts and incorporates by reference the discussions set forth in the Petitions relating to the historical background to and promulgation of Order 451, and Louisiana adopts the summaries in the Petitions of the opinions below.

prices previously applicable to various "vintages" of gas.

The Court of Appeals also found unlawful other portions of Order 451 intended to give effect to the FERC's objectives, in promulgating Order 451, of ending market distortions and permitting the development of up to an estimated 11 trillion cubic feet of gas reserves which would otherwise be lost.[2]

If allowed to stand, the impact of the majority's ruling upon natural gas markets will be severly disruptive. The Producers have estimated that at least 3,000 natural gas contracts have been renegotiated or terminated on the basis of Order 451. These contracts cover some 6.85 trillion cubic feet of natural gas, worth some $13.7 billion at spot market prices as of the end of 1989.[3] The U.S. Department of Energy ("DOE") has conservatively estimated that, as of the end of 1988, 1,286 contracts had been renegotiated under Order 451, covering some 1.6 trillion cubic feet of natural gas worth some $3.2 billion at the end of 1989.[4] The majority's ruling threatens to nullify all of these contract renegotiations and terminations, and it throws into question actions and

[2] *See* FERC Petition at 6. Louisiana supports the position of FERC and the Producers on all issues. This brief, however, is limited to addressing the issue of the FERC's power to act by general rule to raise old gas prices and, in the process, to collapse the vintages previously established by the FERC's predecessor, the Federal Power Commission.

[3] Producers Petition at 13, 26-27.

[4] Natural Gas Price Controls: Hearing on H.R. 5195 Before the Subcommittee on Energy and Power of the House Committee on Energy and Commerce, 101st Cong., 1st Sess. (Apr. 5, 1989), at 156. *See* Producers Petition at 13, 26.

agreements by subsequent buyers and sellers of old gas who have acted in reliance on Order 451.

Louisiana, which is both a major gas producing state and a major gas consuming state, will be seriously harmed if the decision of the Court of Appeals is not reviewed and reversed by this Court. Louisiana produced in 1988 some 5.1 trillion cubic feet of natural gas (second only to Texas) out of a national total of 17.8 trillion cubic feet.[5] On a per capita basis, Louisiana is the nation's largest consuming state. The majority's ruling thus threatens major disruption to Louisiana's economy.

The ruling of the Court of Appeals is plainly wrong because of its failure to follow unambiguous statutory language. Both Sections 104(b)(2) and 106(c) of the NGPA explicitly authorize FERC to act by "rule or order" to raise the ceiling price of "old" gas. Under long-established rules of statutory construction, it was inappropriate for the majority of the panel below to resort to the legislative history of the NGPA in order to reach a conclusion at odds with the statutory language. In any event, the legislative history does not support the conclusion of the majority below that the FERC does not have the power to raise old gas prices by rule, as it did in Order 451.

REASONS FOR GRANTING THE PETITIONS

The heart of the Court of Appeals' majority opinion is that FERC did not have the authority to act by rule to raise the ceiling price for old gas covered by Sections 104(b)(1) and 106(a) of the NGPA to a new

[5] I, *Natural Gas Annual 1988*, Energy Information Administration, U.S. Department of Energy, at 4.

ceiling price. The majority is plainly wrong. Sections 104(b)(2) and 106(c) expressly authorize FERC, "by rule or order" to set a "higher" maximum lawful price for old gas, so long as it is "just and reasonable within the meaning of the Natural Gas Act."[6] Order 451 does just that, and the majority failed to point to any statutory language in the NGPA that would preclude FERC from raising the ceiling prices and, in the process, eliminating previously existing distinctions between different "vintages" of gas.

To justify its interpretation of the statute, the majority relied exclusively on four floor statements by members of Congress to the effect that a purpose of the NGPA is to protect consumers. Those statements make no specific reference to the Commission's authority to raise prices under Sections 104 and 106, and they do not purport to be interpreting that authority. Given the unambiguous statutory language of Sections 104(b)(2) and 106(c), the majority erred in reaching beyond the language of the statute to base

[6] Section 104(b)(2) of the NGPA, which in all relevant respects is identical to Section 106(c), provides:

> **Ceiling prices may be increased if just and reasonable**—The Commission may, by rule or order, prescribe a maximum lawful ceiling price, applicable to any first sale of any natural gas (or category thereof, as determined by the Commission) otherwise subject to the preceding provisions of this section, if such price is—
>
> (A) higher than the maximum lawful price which would otherwise be applicable under such provisions; and
>
> (B) just and reasonable within the meaning of the Natural Gas Act.

15 U.S.C. § 3314(b)(2); *see also* 15 U.S.C. § 3316(c).

its holding on fragments of irrelevant legislative history that are at best inconclusive. *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984).[7] The majority went well beyond its appropriate role as a reviewing court and usurped functions belonging to Congress and to the FERC.

The error of the majority is spelled out clearly in the dissent of Judge Brown. Judge Brown is experienced and knowledgeable on issues relating to natural gas regulation. During his almost thirty-five years as a federal appellate judge, he has authored twenty-nine reported opinions[8] involving natural gas issues

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[7] If the majority had believed that the FERC had the power to act by rule to raise old gas prices but had exercised that power improperly or without adequate evidence (a finding the court below did not make) the appropriate response would hve been for the court to remand Order 451 to FERC for further proceedings, not to vacate it.

[8] Cobb v. Natural Gas Pipeline Co. of America, ___ F.2d ___, 1990 WL 25044 (5th Cir. 1990);

Texas Eastern Transmission Corp. v. Federal Energy Regulatory Commission, 893 F.2d 767 (5th Cir. 1990);

Brooklyn Union Gas Co. v. Federal Energy Regulatory Commission, 893 F.2d 777 (5th Cir. 1990);

Texaco, Inc. v. Federal Energy Regulatory Commission, 886 F.2d 749 (5th Cir. 1989);
Mobil Producing Texas & New Mexico, Inc. v. Federal Energy Regulatory Commission, 886 F.2d 745 (5th Cir. 1989);

Gulf South Pipeline Co. v. Federal Energy Regulatory Commission, 876 F.2d 431 (5th Cir. 1989);

Diamond Shamrock Exploration Corp. v. Hodel, 853 F.2d 1159 (5th Cir. 1988);

Amoco Production Co. v. Sea Robin Pipeline Co., 844 F.2d 1202

and has participated in the panel in one hundred six reported natural gas cases. Only two of the opinions he authored were reversed, both in the early 1960's.[9]

(5th Cir. 1988);

Louisiana Land and Exploration Co. v. Federal Energy Regulatory Commission, 788 F.2d 1132 (5th Cir. 1986);

Coastal Oil & Gas Corp. v. Federal Energy Regulatory Commission, 782 F.2d 1249 (5th Cir. 1986);

Ecee, Inc. v. Federal Energy Regulatory Commission, 611 F.2d 554 (5th Cir. 1980);

United Gas Pipe Line Co. v. Federal Energy Regulatory Commission, 597 F.2d 581 (5th Cir.), *cert. denied*, 445 U.S. 916 (1980);

Sebring Utilities Commission v. Federal Energy Regulatory Commission, 591 F.2d 1003 (5th Cir. 1979), *cert. denied*, 444 U.S. 879 (1979);

Pennzoil Co. v. Federal Energy Regulatory Commission, 591 F.2d 301 (5th Cir. 1979);

Public Service Co. of North Carolina, Inc. v. Federal Energy Regulatory Commission, 587 F.2d 716 (5th Cir. 1979), *cert. denied*; 444 U.S. 879 (1979);

In re Southwest Area Rate Case (OSWA I), 484 F.2d 469 (5th Cir. 1973);

Placid Oil Co. v. Federal Power Commission, 483 F.2d 880 (5th Cir. 1973), *aff'd*, 417 U.S. 283 (1976);

Weymouth v. Colorado Interstate Gas Co., 367 F.2d 84, (5th Cir. 1966);

J.M. Huber Corp. v. Denman, 367 F.2d 104, (5th Cir. 1966);

United Gas Pipe Line Co. v. Federal Power Commission, 350 F.2d 689 (5th Cir. 1965), *aff'd*, 385 U.S. 83 (1966);

Callery Properties, Inc. v. Federal Power Commission, 335 F.2d

Judge Brown's dissent shows compellingly how Sections 104(b)(2) and 106(c) give FERC the authority generally to raise ceiling prices for "old" gas and specifically to establish a single price applicable to the fifteen vintages established in previous administrative decisions by the Federal Power Commission.

The legal principles requiring reversal of the majority's ruling are well stated in the dissent. Of equal importance are the practical consequences of allowing the majority's decision to stand. Only if this Court issues the writs of certiorari and reverses the ma-

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1004 (5th Cir. 1964), *rev'd*, 382 U.S. 223 (1965);

Hill v. Federal Power Commission, 335 F.2d 355 (5th Cir. 1964);

Hunt Oil Co. v. Federal Power Commission, 306 F.2d 878 (5th Cir. 1962);

Hunt v. Federal Power Commission, 306 F.2d 334 (5th Cir. 1962), *rev'd.*, 376 U.S. 515 (1964);

Texas Eastern Transmission Corp. v. Federal Power Commission, 306 F.2d 345 (5th Cir. 1962), *cert. denied*, 375 U.S. 941 (1963);

Hunt Oil Co. v. Federal Power Commission, 306 F.2d 359 (5th Cir. 1962);

Freeland v. Sun Oil Company, 277 F.2d 154 (5th Cir.), *cert. denied*, 364 U.S. 826 (1960);

Truckline Gas Company v. Federal Power Commission, 247 F.2d 159 (5th Cir. 1957);

Bazemore v. Whittington, 245 F.2d 943 (5th Cir. 1957);

Hunt Oil Company v. Federal Power Commission, 236 F.2d 828 (5th Cir. 1956), *cert. denied*, 352 U.S. 970 (1957).

[9] The information relating to Judge Brown's opinions was obtained by a computer search of decisions reported in the West Federal Reporter.

jority opinion can harmful disruptive effects to gas markets be avoided.

CONCLUSION

The petitions of the Producers and the Federal Energy Regulatory Commission for writs of certiorari should be granted.

Respectfully submitted,

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